UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	***)***	
	)	
v.	***)***	***Criminal No. 94-63-P-H***
	)	***(Civil No. 97-106-P-H)***
ALLEN J. ADAMS,	***)***	
	)	
Defendant		

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

Allen J. Adams moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Adams was convicted on a guilty plea of conspiracy to hinder others in the free exercise of federally secured rights, a violation of 18 U.S.C. § 241, and two counts of racially motivated interference with the use of a public accommodation, in violation of 18 U.S.C. § 245. He contends that he received ineffective assistance of counsel because the attorney who represented him at sentencing did not object to the court's alleged failure to state on the record its reasons for imposing a sentence at the midpoint of the range set by the United States Sentencing Commission Guidelines and because a second attorney did not raise this issue on appeal.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because ;they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citation omitted). In this instance, I find that Adams's allegations are insufficient to justify relief even if accepted as true,

and accordingly I recommend that his motion be denied without an evidentiary hearing.

I. Background

As the First Circuit noted on direct appeal of this matter,

> [I]n the early hours of September 19, 1992, Adams accosted Ruben Gonzales, Oscar Luna and Emiliano Valenzuela as they attempted to enter a convenience store, calling them "f_____ Mexicans" who should go back to Mexico where they "belonged," and offering to send them back in a body bag. Page [Adams's co-defendant] joined Adams, who grabbed Page's handgun from inside the truck, stuck it to Gonzales' temple and threatened to "blow his head off." An employee called the police, whereupon Gonzales and his companions drove off with a fourth friend who had remained in their car. Page jumped in his truck and followed, with Adams in the passenger seat and the gun between them, and two cohorts riding in back. Two other carloads of their friends joined the chase. Driving about 75 miles an hour, Page pulled up behind Gonzales' car, fired seven shots into the air, and at Adams' urging, two more directly into the back of the vehicle and two at the ground behind it. One bullet struck Luna in the arm, another lodged in the headrest behind Gonzales' head. Page then slowed and turned back. Luna was taken to a hospital shortly, treated for a gunshot wound to his right upper arm and released approximately 90 minutes later. He lost use of his arm and was unable to work for three weeks, and continued to suffer residual pain for some time.

United States v. Page, 84 F.3d 38, 40 (1st Cir. 1996).

Following his guilty plea, Adams was sentenced on July 10, 1995. Judgment (Docket No. 30). After determining that the sentencing range for Adams under the Guidelines was 78 to 97 months, the court imposed a sentence of 88 months imprisonment. Transcript of Proceedings [Sentencing Hearing] ("Transcript") at 67, 76. Adams took an appeal from the sentence, in which he was represented by new counsel. *Page*, 84 F.3d at 40. It is not clear from the reported decision whether the specific issue now asserted by Adams was raised in that appeal, *id*. at 43 ("Defendants' remaining contentions have been implicitly disposed of by the foregoing discussions, or do not merit

further reflection."), but Adams asserts that it was not. Motion to Vacate (Docket No. 39) at 3.

II. Analysis

Adams asserts that he was deprived of his Sixth Amendment right to effective assistance of counsel by the failure of his first lawyer to object at the sentencing hearing on the grounds that the court failed to state, in open court, its reason for imposing sentence at the midpoint of the applicable range, rather than at the low end. He also argues that "no circumstances in the present case warranted a sentence at mid-range of the applicable Sentencing Range." *Id*. at 5. He suggests that his appellate counsel also provided constitutionally deficient assistance when he failed to appeal on this ground.

Under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), Adams must establish both that his attorneys' performances were deficient and that the challenged action caused him prejudice. He must show that, but for the deficiencies in counsel's performance, there was a reasonable probability that the result of his case would have been different. *Smullen v. United States*, 94 F.3d 20, 23 (1st Cir. 1996). Adams cannot possibly carry his burden in this regard, because his motion is based on a fundamental misunderstanding of the applicable statute.

Adams appropriately cites 18 U.S.C. § 3553(c) as the source of the requirement that the sentencing court state its reasons for the particular sentence, but he ignores subsection (1) of that section of the statute, which provides:

> The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence --
> (1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range.

18 U.S.C. § 3553(c)(1). Adams does not dispute that the range in his case was 79 to 97 months, a total range of 18 months. This range does not exceed 24 months, so the court was not required to state the reason for imposing a sentence of 88 months. A defendant's lawyer is not required to make futile, baseless objections or to appeal on a ground that has no merit in order to provide constitutionally sufficient assistance.

In addition, the record demonstrates that Adams's trial counsel argued for imposition of a sentence at the low end of the range, Transcript at 56-65, and that the court amply stated its reasons for the imposition of the particular sentence, *id*. at 40-46, 66-70. There was no abuse of the discretion allowed to the district court within the guideline range. *United States v. Paz Uribe*, 891 F.2d 396, 400 (1st Cir. 1989). The case upon which Adams relies, *United States v. Catano*, 65 F.3d 219, 229 (1st Cir. 1995), is inapposite; it deals with enhancements within the sentencing guidelines that determine the applicable sentencing range, not with the statutory requirement that the sentencing court state the reasons for particular sentence within the applicable range that the court chooses to impose.

III. Conclusion

For the foregoing reasons, I recommend that the petitioner's motion to vacate, set aside or correct his sentence be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this ___ day of May, 1997.

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David M. Cohen
United States Magistrate Judge